

# Court of Appeals, State of Michigan

## ORDER

People of MI v Queshon Quamon Barkus

Henry William Saad  
Presiding Judge

Docket No. 278761

Karen Fort Hood

LC Nos. 05-204135-FH & 05-204137-FH

Stephen L. Borrello  
Judges

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On the Court's own motion, the opinion issued in this case on July 22, 2008, is AMENDED as follows:

1. The caption is modified to include LC No. 05-204135-FH.
2. The first paragraph of the opinion is replaced with the following paragraph (new text is underlined):

Defendant pleaded guilty to delivery and manufacture of a controlled substance between 50 and 449 grams, MCL 333.7401(2)(a)(iii), felon in possession of a firearm, MCL 750.224f, possession of less than 25 grams of a controlled substance, two counts of possession of a firearm during the commission of a felony, MCL 750.227b, delivery of less than 50 grams of a controlled substance, MCL 333.7401(2)(a)(iv), and third degree fleeing and eluding, MCL 257.602a(3). He was sentenced as a third habitual offender, MCL 769.11, to concurrent terms of 117 to 480 months on the delivery convictions, and 80 to 120 months on the felon in possession conviction and fleeing and eluding conviction, to be served consecutively to concurrent terms of 64 to 96 months on the possession conviction and two years on the felony firearm convictions. Following this Court's denial of defendant's delayed application for leave to appeal, Docket No 274765, our Supreme Court remanded to this Court for "consideration, as on leave granted, of whether the Oakland Circuit court erred in scoring Sentencing Guidelines Offense Variable 13, MCL 777.43, at 25 points. See *People v Francisco*, 474 Mich 82, 96[; 711 NW2d 44] (2006)." We affirm defendant's convictions, vacate his sentences, and remand for a recalculation of the sentencing guidelines and resentencing. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

3. The third paragraph of the opinion is replaced with the following paragraph (new text is underlined):

In the instant case, defendant received a score of 25 points for OV 13 based on three crimes against persons that were committed in 1990. These three crimes were beyond the five-year period that included the sentencing offenses. The sentencing offenses themselves did not involve any crime against a person. We note that the factual basis for the plea and the agent's description of the offense in the presentence investigation report indicate that the third degree fleeing and eluding conviction did not result from injury to a person. It was based on the crime having taken place in an area

where the speed limit was 35 miles an hour or less. Thus, defendant should have received a score of zero points for OV 13. Defendant's total OV score should have been 50, and his minimum guidelines range should have been 99 to 160 months instead of 117 to 160 months. The understanding at defendant's plea was that he would be sentenced at the low end of the guidelines range. Although an erroneous scoring does not require resentencing if the trial court would have imposed the same sentence regardless of the error, *People v Mutchie*, 468 Mich 50, 51-52; 658 NW2d 154 (2003), this case must be remanded since such a conclusion cannot be drawn.

In all other respects, the July 22, 2008, opinion remains unchanged.



A true copy entered and certified by Sandra Schultz Mengel, Chief Clerk, on

OCT 20 2008  
Date

*Sandra Schultz Mengel*  
Chief Clerk

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

QUESHON QUAMON BARKUS,

Defendant-Appellee.

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UNPUBLISHED

July 22, 2008

No. 278761

Oakland Circuit Court

LC No. 05-204137-FH

Before: Saad, C.J., and Fort Hood and Borrello, JJ.

PER CURIAM.

Defendant pleaded guilty to delivery and manufacture of a controlled substance between 50 and 449 grams, MCL 333.740124(a)(4), felon in possession of a firearm, MCL 750.224f, possession of less than 25 grams of a controlled substance, and two counts of possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced as a third habitual offender, MCL 769.11, to concurrent terms of 117 to 480 months on the delivery conviction and 80 to 120 months on the felon in possession conviction, to be served consecutively to concurrent terms of 64 to 96 months on the possession conviction and two years on the felony firearm convictions. Following this Court's denial of defendant's delayed application for leave to appeal, Docket No 274765, our Supreme Court remanded to this Court for "consideration, as on leave granted, of whether the Oakland Circuit court erred in scoring Sentencing Guidelines Offense Variable 13, MCL 777.43, at 25 points. See *People v Francisco*, 474 Mich 82, 96[; 711 NW2d 44] (2006)." We affirm defendant's convictions, vacate his sentences, and remand for a recalculation of the sentencing guidelines and resentencing. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

MCL 777.43(1)(b) provides that 25 points is to be scored for OV 13 where "[t]he offense was part of a pattern of felonious criminal activity involving 3 or more crimes against a person." MCL 777.43(2)(a) provides, "All crimes within a 5-year period, including the sentencing offense, shall be counted regardless of whether the offense resulted in a conviction." In adopting the dissent in *People v McDaniel*, 256 Mich App 165, 174; 662 NW2d 101 (2003), the *Francisco* Court held that the three or more crimes against a person must occur within five years of the sentencing offense. *Francisco*, *supra* at 96.

In the instant case, defendant received a score of 25 points for OV 13 based on three crimes against persons that were committed in 1990. These three crimes were beyond the five-year period that included the sentencing offenses. The sentencing offenses themselves did not

involve any crime against a person. Thus, defendant should have received a score of zero points for OV 13. Defendant's total OV score should have been 50, and his minimum guidelines range should have been 99 to 160 months instead of 117 to 160 months. The understanding at defendant's plea was that he would be sentenced at the low end of the guidelines range. Although an erroneous scoring does not require resentencing if the trial court would have imposed the same sentence regardless of the error, *People v Mutchie*, 468 Mich 50, 51-52; 658 NW2d 154 (2003), this case must be remanded since such a conclusion cannot be drawn.

Defendant, acting *in propria persona*, has filed a Standard 4 Brief, see AO 2004-6, raising additional issues. In its remand order, our Supreme Court denied leave on all other issues because "it was not persuaded that the remaining questions presented should be reviewed by this Court." In *People v Fisher*, 449 Mich 441, 446-447; 537 NW2d 577 (1995), our Supreme Court precluded action on remand if it was inconsistent with its judgment. Addressing defendant's additional arguments would not be inconsistent with the remand order. Moreover, the law of the case doctrine would not preclude review. Although this Court previously denied leave "for lack of merit in the grounds presented," Docket No. 274765, the issues defendant raises in his Standard 4 brief were not raised in the prior appeal. Since the "issue[s] now before [the Court] [were not] raised for a legal determination" in the prior appeal and the order therefore did not address these issues, the law of the case doctrine does not apply. *People v Douglas (On Remand)*, 191 Mich App 660, 662; 478 NW2d 737 (1991).

Nonetheless, defendant's arguments do not warrant additional relief. He asserts that the trial court abused its discretion by not allowing him to withdraw his plea given that it was tendered with the understanding that OV 13 would not be scored at 25 points. This issue need not be addressed since the case must be remanded for a rescoring of OV 13 at zero and resentencing. Defendant also argues that his counsel provided ineffective assistance by failing to make a motion to allow him to withdraw his plea. In fact, counsel did make such a request. Moreover, the basis advanced for withdrawal was the increased guidelines range based on the score given to OV 13. Since this issue will be addressed on remand, it will not serve as a basis for withdrawal of the plea. Finally, defendant argues that he was illegally stopped and searched, and that this led to an invalid search of his residence. However, defendant did not tender his guilty plea on the condition that he would be permitted to raise this argument on appeal. See MCR 6.301(C)(2). Accordingly, it is waived. See *People v Kelley*, 181 Mich App 95, 96-97; 449 NW2d 109 (1989).

Defendant's convictions are affirmed, his sentences are vacated, and this case is remanded for a rescoring of the sentencing guidelines and resentencing. We do not retain jurisdiction.

/s/ Henry William Saad  
/s/ Karen M. Fort Hood  
/s/ Stephen L. Borrello